THE COMMITTEE ON ENERGY AND COMMERCE

INTERNAL MEMORANDUM

May 23, 2011

To: Members of Committee on Energy and Commerce

From: Majority Committee Staff

Re: Full Committee Markup of H.R. 1939, "Enhancing CPSC Authority and Discretion Act of 2011" (ECADA)

I. Summary

The Subcommittee on Commerce, Manufacturing, and Trade met in open markup on Thursday, May, 12, 2011, at 9:00 a.m. on a staff draft entitled, "Enhancing CPSC Authority and Discretion Act of 2011" (ECADA). The language would amend the Consumer Product Safety Act and the Consumer Product Safety Improvement Act of 2008. The draft legislation's objectives are: to reduce the regulatory burdens created by CPSIA where possible to do so without harming consumers; to enhance the Consumer Production Safety Commission's (CPSC) ability to investigate complaints and to prioritize based on risk; and, to improve the utility and accuracy of information in the CPSC's public database.

Two amendments were offered by Subcommittee Chairman Bono Mack and were largely technical in nature. The amendments:

- Corrected a drafting error in the discussion draft that inadvertently moved the effective date in existing law from August 2009 to February 2009.

- Clarified that the prerequisite requiring enough lab capacity exist before the CPSC can establish new mandatory third party testing requirements means that sufficient lab capacity must exist immediately or will exist in a reasonable period of time.

- Clarified that third parties who are permitted by law to submit reports of harm to the public database (e.g., government officials, law enforcement, health and child care providers) do not need the permission of the person who was harmed in order to post a report.

- Addresses an omission in CPSIA to protect the privacy of both the person reporting the harm and the person harmed when a third party submits a report on that person's behalf.

- Corrected a drafting error in CPSIA that inadvertently created two sections numbered Section 14(d).

Both amendments were approved by voice vote, as was the draft text. The text, as amended, was introduced as H.R. 1939 on May 23, 2011.

The Committee staff anticipates circulating an amendment in the nature of a substitute tomorrow.

II. Legislative History

In 2007, in response to a number of toy recalls for lead-in-paint violations, then-Chairman Dingell and then-Ranking Member Barton ushered the bipartisan Consumer Product Safety Improvement Act of 2008 through the Committee on Energy and Commerce and the House. After a lengthy conference with the Senate, President Bush signed the CPSIA into law in August 2008.[1]

Even before the end of 2008, significant unintended consequences emerged. Because portions of CPSIA were impossible to implement or comply with for various reasons, the CPSC has issued at least four significant stays of enforcement before this year (currently, testing and certification requirements are stayed; lead limits for ATVs, off-road youth motorcycles, and snowmobiles are stayed; and lead limits for bicycles, jogger strollers, and bicycle tailors are stayed). Many of the conditions which prompted these stays persist today.

The Committee held a single oversight hearing on CPSIA implementation in April 2010. The hearing also focused on a draft amendment authored by Mr. Waxman. That draft received no further official action.

In the 112th Congress, the Subcommittee on Commerce, Manufacturing, and Trade has conducted three separate events on CPSIA implementation. In January, Majority staff hosted a bipartisan stakeholder meeting to gather suggestions for legislation designed to ameliorate the unintended problems arising out of CPSIA. In February, the Subcommittee conducted an oversight hearing on the CPSIA implementation and the CPSC budget. After circulating a discussion draft, the Subcommittee held a legislative hearing in early April. The current discussion draft reflects changes addressing the concerns of majority and minority Members as well as stakeholders across the spectrum.

III. Section-by-Section Summary of ECADA

Section 1. Short title.

Section 2. Revises the definition of the term "children's product" to make it internally consistent. This technical change should have no significant effect on coverage.

Section 3. *Lead Limits*. Restates all lead limits in percentages instead of parts per million (ppm). Revises the lead limits to apply the existing step-down from 0.03 percent to 0.01 percent lead content to products that are intended primarily for children 6 and under and that can be mouthed. Creates Commission authority to apply the 0.01 percent limit to children's products

[1] P.L. 110-314.

intended for children above age 6 or that cannot be mouthed if it determines that it is necessary to protect children's health. Postpones the step-down to 0.01 percent for one year (August 2012). Makes the step-down to 0.03 percent and 0.01 percent prospective, permitting sell-through of existing, legally-compliant inventory.

Exceptions and Alternative Lead Limits. Creates a "functional purpose" exception for products or component parts that cannot meet the lead limits if the lead content serves a functional purpose, and reasonably foreseeable exposure to the product will not result in elevated blood lead levels. Creates an alternate lead limit for outdoor recreational products such as ATVs and bikes (but not wearing apparel such as coats) based on the lead levels CPSC adopted in existing stays of enforcement for some of these products. Permits the sale or distribution of *used* children's products (e.g., resale of charitable donations or circulation of older library books) that may not comply with lead limits.

Section 4. Preserves mandatory third-party testing as a basis for certification to all priority standards named in the original statute (i.e., lead paint, cribs, pacifiers, small parts and lead content in children's metal jewelry), and for all durable nursery products established by the CPSC. Allows CPSC to require third-party testing for other standards (or portions of standards) or for product classes but establishes prerequisites, such as small batch manufacturing exceptions and cost-benefit analysis. Makes it unlawful to divide production into small quantities to avoid third-party testing. Requires CPSC to conduct a review of third-party testing requirements for lead content (not including jewelry), and establishes a moratorium on enforcement until the Commission completes its review and makes any revisions necessary to satisfy the new prerequisites for third-party testing. A review and moratorium will also apply if third-party testing requirements are adopted for phthalate limits and the toy standard before enactment. Allows CPSC to revise other third-party testing requirements to promote flexibility or to remove undue burdens. Gives the Commission the option to require continued compliance testing, subject to a prior determination that the benefits justify the costs.

Section 5. Provides a mechanism for updating durable nursery product standards automatically whenever the voluntary standard is revised, subject to Commission veto. Prevents retroactive application of any future crib standard. Allows licensed child-care facilities (not including home-based child care) to continue using fixed-side cribs they now own (not drop-side cribs) if they have never been recalled and the State or local jurisdiction requires such facilities to meet certain safeguards relating to their cribs.

Section 6. Removes FDA-enforced provisions from the mandatory toy standard.

Section 7. Makes existing phthalate limits applicable only to accessible, plasticized component parts. Gives CPSC flexibility to exempt products from the phthalate prohibition. Creates deadlines for commencing and completing rulemaking to end the interim prohibition if the Chronic Hazard Advisory Panel ("CHAP") so recommends. Harmonizes the definition of "children's toy" with the mandatory toy standard and clarifies that it is limited to items that also fall within the definition of "children's product".

Section 8. Creates Commission authority to exempt products or classes of products from the tracking label requirements where compliance is not practicable and permits the Commission to create alternative tracking label requirements for exempted products.

Section 9. Clarifies eligibility to submit reports of harm to the public database, permitting person who suffered harm or risk of harm, family members, next of kin, or lawyers or other expressly authorized representatives to submit reports. Protects the privacy of the harmed individual on whose behalf a report was submitted by a third party by prohibiting the CSPC from sharing personal information without express consent from the harmed individual. Establishes submission of the location of the product and the contact information for the person harmed as preconditions for posting the report. Establishes a process for improving product descriptions in the reports of harm where the CPSC agrees the initial description is inadequate. Creates a process for resolving claims of material inaccuracy. Makes misrepresentations relating to the database unlawful (e.g., false reports or false claims of material inaccuracy).

Section 10. Augments existing subpoena authority for documents with authority to subpoena physical items. Permits the Commission to delegate subpoena authority to the General Counsel for "friendly" subpoenas to Federal, State, and local government agencies.

Section 11. Deems the CPSC qualified for a HIPAA exception so that it may receive medical information in investigations.

Section 12. Redesignates the second section titled Section 14(d) (inadvertently created by the CPSIA) as Section 14(i).

Section 13. Makes provisions effective on the date of enactment except where otherwise specified.

Please contact Brian McCullough, Gib Mullan, or Shannon Weinberg at ext. 5-2927 with any questions.